INDEX

PAGE

Statement of the Case 1

Reasons for Denying the Writ 4

I. The Court Below Properly Concluded That Respondent's Conduct Was Protected By the 1964 Civil Rights Act 4

II. Respondent Has Not Stated Any Reasons Justifying Certiorari Review 5

Conclusion 6

Table of Cases

Hamm v. Rock Hill, 379 U.S. 306 (1964) 4, 5

McKinnie v. Tennessee, 380 U.S. 449 (1965) 4

Statutes

Civil Rights Act of 1964, 78 Stat. 241 ..... 4, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

T. RALPH GRIMES, Sheriff of Fulton County, Georgia,
Petitioner,

—v.—

TOM TAYLOR TOLG,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Statement of the Case

Petitioner's statement of facts is incomplete and contradicted by the record. Respondent, therefore, submits the following corrections and additions.

On June 17, 1963, respondent Tom Taylor Tolg, a 23-year old white graduate assistant at Miami University, Oxford, Ohio, was arrested at Leb's Restaurant in Atlanta, Georgia when he and 13 others, including 11 Negroes, attempted to enter for lunch (Tr.* 4, 53).

Uncontroverted testimony shows that Tolg and his companions were clean, quiet and sober; at no time were they

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* Tr. refers to the brief of evidence upon the trial of the case in the Superior Court, Fulton County, Georgia, filed May 11, 1964.

boisterous or unruly (PA** 87). Nevertheless, when they approached the foyer of the restaurant the employees of the restaurant, stationed outside the entrance, attacked the group as it entered the foyer and the owner held the door against their entry (PA 72, Tr. 2, 3, 18, 19). A crowd quickly formed around respondent Tolg and his companions, and they were further beaten, kicked and punched (Tr. 11, 13, 30, 75, 76; R. 66-68). Two of Tolg's companions subsequently received hospital treatment for lacerations (PA 79, Tr. 62).

At no time did Tolg or his companions assault anyone, and at no time did they physically defend themselves. Instead, they locked arms to protect themselves against further injuries and to avoid responding with violence (Tr. 35, 86, PA 94, 104; R. 56, 68). The assault on them continued, however, until Lt. Perry of the Atlanta Police Department arrived and ordered the "rough stuff" terminated (PA 82).

It is uncontroverted that within 12 minutes of his arrival, Lt. Perry arrested Tolg and his companions and carried them to the parked police wagons (PA 60). One member of the group explained why it was necessary to carry him away:

> I felt unable to leave the restaurant because of two facts already described. One, I was very shaken up by the beating and, two, there was a very hostile crowd there which, I felt that in all consideration of my personal property, which includes myself, that it was safer to remain on the premises rather than walk into a crowd (PA 98).

** PA refers to the transcript of evidence taken on the Plea of Abatement in the Superior Court, Fulton County, Georgia, filed May 11, 1964.

The police did not arrest any of the people who attacked the students (Tr. 63).

After being convicted and sentenced, Tolg filed motions in arrest of judgment and for a new trial (R. 141-142). At a hearing on February 11, 1964, the parties agreed that the court would not rule on the motions until the transcript of the plea in abatement had been completed and approved by the court (R. 144-146). Judge Durwood T. Pye had 90 days from the presentment of the transcript of evidence on the plea of abatement to rule on the motions. On March 11, 1964 the completed transcript was delivered to Tolg's counsel. The court approved the transcript on March 12, 1964 and overruled the motions on March 13, 1964 (R. 141-143, 147).

Tolg's attorney testified that he never was notified that the motions had been overruled. He learned of the court's action when he encountered Judge Pye in court on April 17, 1964 and questioned him about the motions. By that time, the time for filing a bill of exceptions had expired. Mrs. Lorraine Johnson, secretary to Judge Pye, testified that she mailed a copy of the orders to Tolg's attorneys on March 13, 1964 (R. 16, 18, 21). There was no record of the mailing and Mrs. Johnson admitted she was relying solely upon her recollection (R. 19-20).

Reasons for Denying the Writ

I.

The court below properly concluded that respondent's conduct was protected by 1964 Civil Rights Act.

Petitioner, by suggesting that Tolg's conduct was forcible and therefore not protected by the 1964 Civil Rights Act,[1] has deliberately misstated the basis of the District Court's decision and distorted the evidence reviewed by the Court of Appeals. The District Court did not find, as suggested by petitioner, that Tolg forcibly sought entry to Leb's Restaurant. Indeed, the court found only that Tolg and the others had restricted access to the restaurant (R. 154). The Court of Appeals had an uncontroverted record showing that Tolg and the others were orderly and that they acted only to protect themselves against assaults.

Petitioner's distortion of the evidence is exemplified by the comment that the decision below in effect protects conduct that "does not differ in kind" from "pull[ing] a pistol, shoot[ing] and kill[ing] the offending restaurant owner" (p. 8 Petition for Writ of Certiorari). Respondent submits, however, that the conduct here more closely resembles that reviewed in *McKinnie* v. *Tennessee,* 380 U.S. 449 (1965), where this Court reversed pre-enactment convictions against petitioners who similarly had been prevented from entering a restaurant. There, as here, crowding resulted from holding the door against the entry of the group seeking service.

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[1] *Hamm* v. *Rock Hill,* 379 U.S. 306, 311 (1965) voided pre-enactment convictions for *"nonforcible"* attempts to gain admittance or to remain in places of public accommodations. (Emphasis added.)

II.

Respondent has not stated any reasons justifying certiorari review.

Petitioner has urged this Court to review the Court of Appeal's application of the abatement principle of *Hamm* v. *Rock Hill,* 379 U.S. 306 (1964) to convictions on collateral review at the time of the passage of the 1964 Civil Rights Act. Significantly, petitioner offers no reasons justifying certiorari review and fails to mention that only two or three cases now pending would be affected by such a review. Nearly all pre-enactment convictions have been dismissed under the mandate of *Hamm,* and what was in that case a matter of great public importance has become insignificant.

Respondent respectfully submits that this case does not raise any of the considerations which normally motivate this Court to exercise certiorari jurisdiction. Not only is this case not of general public importance, it does not involve a conflict between Courts of Appeals, nor does it conflict with the decision of this Court in *Hamm* v. *Rock Hill,* 379 U.S. 306. In voiding respondent's pre-enactment conviction, the Court of Appeals for the Fifth Circuit merely applied the rule of law formulated in *Hamm* to the facts of the case before it.

CONCLUSION

Respondent respectfully submits that the Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
Suite 2030
10 Columbus Circle
New York, New York 10019

HOWARD MOORE, JR.
DONALD L. HOLLOWELL
859½ Hunter Street, N. W.
Atlanta, Georgia

Attorneys for Respondent

SHEILA RUSH
Of Counsel